Supreme Court, U.S.
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No. (1) 06-369

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IN THE

Supreme Court of the United States

STATE OF MISSOURI,

Petitioner,

v.

VINCENT MCFADDEN,

Respondent.

On Petition For Writ Of Certiorari To The Missouri Supreme Court

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Does the leeway this Court afforded state courts in defining procedures to evaluate equal-protection claims under *Batson v. Kentucky*, 476 U.S. 79 (1986), allow a state court to essentially eliminate the defendant's burden of proving purposeful racial discrimination *at trial*, in favor of allowing the defendant to sift through the record after trial and raise new arguments on appeal, at a time when the prosecutor is unable to provide any additional explanation, and at a time when the finder of fact – the trial judge – is not present to rule on any applicable questions of fact?

Does the "totality of relevant facts" test, as recently applied in *Miller-El v. Dretke*, 545 U.S. 231 (2005), permit a reviewing court to analyze the facts *de novo* in determining whether the trial court has clearly erred in finding that the State has not engaged in purposeful racial discrimination?

PARTIES TO THE PROCEEDING

The petitioner, State of Missouri, was the respondent below. The respondent, Vincent McFadden, was the appellant.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION AND STATEMENT 1

REASONS FOR GRANTING THE WRIT 5

I. *Batson* and its progeny have consistently allocated the burden of proving purposeful discrimination to the defendant *at trial*, and the Missouri Supreme Court's procedure in this case is a stark departure from that requirement. 5

II. The procedure followed by the majority of the Missouri Supreme Court will not enhance the court's ability to curtail discrimination, and inasmuch as it conflicts with *Batson* and other decisions from the Federal Circuit Courts and state courts of last resort it should not be allowed to stand. 11

III. The Missouri Supreme Court's procedure places the reviewing court in the position of having to evaluate facts *de novo*, and of having to resolve factual questions from an inferior standpoint, without the benefit of "all possible explanatory

factors." 14

IV. A procedure that allows a defendant to stand silent at trial (or to raise new arguments and factual claims on appeal) will transform *Batson* into a guessing game for prosecutors and merely encourage sandbagging. 19

CONCLUSION 21

APPENDIX 22

TABLE OF CONTENTS 23

TABLE OF AUTHORITIES

Page

CASES

Atwater v. Crosby, 451 F.3d 799 (11th Cir. 2006) 12

Batson v. Kentucky, 476 U.S. 79 (1986) 2, 3, 5-7

Hernandez v. New York, 500 U.S. 352 (1991) . 15, 19

Hightower v. Terry, --- F.3d ----, 2006 WL 2252512 (11th Cir. 2006) 13

Johnson v. California, 125 S.Ct. 2410 (2005) 6, 7, 10, 17

Miller-El v. Dretke, 125 S.Ct. 2317 (2005) . . . 2, 7, 10, 11, 13

People v. Gray, 118 P.3d 496 (Cal. 2005) 14

Purkett v. Elem, 515 U.S. 765 (1995) 6

Rice v. Collins, 126 S.Ct. 969 (2006) 15

State v. Parker, 836 S.W.2d 930 (Mo. 1992) 8

State v. Walston, 886 P.2d 349 (Kan. 1994) 13

Swain v. Alabama, 380 U.S. 202 (1965) 2

United States v. Boyd, 168 F.3d 1077 (8th Cir. 1999) 12

United States v. Forbes, 816 F.2d 1006 (5th Cir. 1987) 12

CONSTITUTIONAL AND STATUTORY AUTHORITY

Constitution of the United States, Amendment XIV, § 1 11

OPINIONS BELOW

The opinion of the Missouri Supreme Court reversing the trial court's judgment and sentence, filed May 16, 2006, and reported at 191 S.W.3d 648 (Mo. banc 2006), is reprinted in the Appendix ("App.") at A2-A27. The order denying petitioner's motion for rehearing is unreported, and it is reprinted in the Appendix at A1.

JURISDICTION

The Missouri Supreme Court entered its judgment on May 16, 2006. The Court denied petitioner's motion for rehearing on June 13, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, § 1:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION AND STATEMENT

1. This petition asks the Court to clarify whether the leeway this Court afforded state courts in defining procedures to evaluate equal-protection claims under *Batson v. Kentucky* allows a state court to effectively eliminate a defendant's burden of proving purposeful racial discrimination *at trial*, in favor of allowing the defendant to sift through the record after trial and raise new arguments on appeal, at a time when the

prosecutor is unable to provide any explanations, and when no factfinder can weigh credibility. This petition also asks the Court to clarify whether the "totality of relevant facts" test, as recently applied in *Miller-El v. Dretke*, 125 S.Ct. 2317 (2005), permits a reviewing court to analyze the facts *de novo* in determining whether the trial court has clearly erred in finding that the State has not engaged in purposeful racial discrimination.

2. In *Batson v. Kentucky*, 476 U.S. 79, 85 (1986), the Court continued its "unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn." In particular, in devising general guidelines for trial courts to follow in determining whether the State had engaged in purposeful discrimination, the Court examined the "recurring question . . . whether the defendant had met his burden of proving purposeful discrimination on the part of the State." *Id.* at 90.

In resolving the issue, the Court departed from the previous standard of proof, which had been set forth in *Swain v. Alabama*, 380 U.S. 202 (1965), noting that many lower courts' "interpretation of *Swain* ha[d] placed on defendants a crippling burden of proof" that rendered "prosecutors' peremptory challenges . . . largely immune from constitutional scrutiny." *Id.* at 92-93. The Court then reviewed its precedents and observed "since the decision in *Swain*, this Court has recognized that a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection *in his case*." *Id.* at 95.

And, while the Court "decline[d] . . . to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges," *id.* at 99, the Court nevertheless outlined the general procedure that must be followed. *Id.* at 94-99. First, the defendant must make "a prima facie case of purposeful discrimi-

nation." *Id.* at 94-97. Second, the State must give legitimate race-neutral explanations for the strikes. *Id.* at 97-98. And, finally, "[t]he trial court then will have the duty to determine if the defendant has established purposeful discrimination." *Id.* at 98.

In outlining these guidelines the Court explained that the defendant carried the burden of proving purposeful discrimination. "As in any equal protection case, the 'burden is, of course,' on the defendant who alleges discriminatory selection of the venire 'to prove the existence of purposeful discrimination.' " *Id.* at 93. Moreover, the Court plainly contemplated that the defendant would carry this burden *at trial*, where the prosecutor would have an opportunity to give explanations, and where the trial court would then have the opportunity to make any necessary factual findings. "When circumstances suggest the need [*i.e.*, when there is an inference of purposeful discrimination], the trial court must undertake a 'factual inquiry' that 'takes into account all possible explanatory factors' in the particular case." *Id.* at 95.

3. In this case, at the close of voir dire, the State used five of its six peremptory challenges to remove African-American venirepersons from the panel. The respondent raised a *Batson* claim, asserting that the State's strikes were motivated by purposeful racial discrimination. (In Missouri, to initiate a *Batson* hearing, the defendant need only identify the racial group of the stricken venirepersons – there is no additional showing that is necessary at that point.) The State responded with race-neutral reasons for each strike. The respondent was then given the opportunity to prove that the State's reasons were pretextual.

To that end, the respondent offered some limited argument as to three of the State's strikes, but he did not offer any argument about two of the State's strikes. The prosecutor responded to the respondent's

arguments. The trial court then evaluated the State's reasons, considered the respondent's arguments, and concluded – based on the evidence presented at trial, and based on the court's long experience with the prosecutors – that the strikes were not motivated by racial discrimination.

More specifically, the trial judge observed (1) that he had "known Mr. Waldemer [one of the two prosecutors] for 15 plus years, and never had any experience with him that would indicate that he would ever use a peremptory challenge in a racially motivated manner"; (2) that he had known Mr. Bishop [the other prosecutor] for four years, and that he had "never had any experience where he has exercised strikes in a racially motivated manner"; (3) that there were multiple "race neutral reasons for each of the strikes"; and (4) that there were "no similarly situated jurors who [were] not stricken"(Voir Dire Tr. 676-677). The court also observed: "And although there may be a similarly situated juror for one of the reasons, there is no juror similarly situated in the Court's view . . . ." (Voir Dire Tr. 677). The trial court also noted that race did not appear to be a factor in the underlying crime, inasmuch as the defendant, the victim, and most of the main witnesses were African-Americans (Voir Dire Tr. 679).

4. On appeal, the respondent again raised his *Batson* claim. But unlike trial, where the respondent made few if any arguments to support his allegation of purposeful discrimination, the respondent raised numerous new arguments (and cited to facts never before mentioned) to support his assertion that the State's race-neutral reasons were merely pretextual explanations that masked the prosecutors' racial discrimination.

A four-judge majority of the Missouri Supreme Court accepted the respondent's newly-minted arguments and concluded that the State had engaged in purposeful

racial discrimination. App. at A19-A20. The majority ignored the fact that respondent had not raised his arguments and marshaled his evidence at trial, and, citing to the "totality of the facts and circumstances" test that is applied in *Batson* cases, the court held that the trial court had clearly erred in finding that the prosecutors had not struck the venirepersons because of their race. App. at A17.

Three judges dissented, concluding that the majority opinion had selectively identified the applicable law, had misapplied the law to the facts, and had, in several instances, mischaracterized the facts. App. at A20. The dissenters averred that the majority had, instead of deferring to the factual findings of the trial court, "engag[ed] in *de novo* review so as to reach its preferred outcome." App. at A20. The dissenters also recognized that the majority had ignored the fact that respondent was raising new arguments and marshaling new evidence on appeal. App. at A23 ("the majority inexplicably fails to acknowledge that [respondent] did not challenge the State's reasons for striking two of the venirepersons"). And, applying a deferential standard to the trial court's factual findings, the dissenters concluded that there was ample evidence to support the trial court's determination that the prosecutors had not engaged in purposeful racial discrimination. App. at A26-27.

REASONS FOR GRANTING THE WRIT

I. *Batson* and its progeny have consistently allocated the burden of proving purposeful discrimination to the defendant *at trial*, and the Missouri Supreme Court's procedure in this case is a stark departure from that requirement.

The question in *Batson v. Kentucky* concerned the method by which the defendant could prove that the

State had engaged in purposeful discrimination. 476 U.S. at 90. It was, of course, a foregone conclusion that the defendant bore the burden of proving that the State had engaged in purposeful discrimination. "As in any equal protection case, the 'burden is, of course,' on the defendant who alleges discriminatory selection of the venire 'to prove the existence of purposeful discrimination.'" *Id.* at 93. And, since *Batson*, the Court has always maintained that the burden remains on the defendant. *See Johnson v. California*, 125 S.Ct. 2410, 2416-2418 (2005) (while clarifying that the defendant did not have to show that purposeful discrimination was "more likely than not" in the first step of a *Batson* challenge, the Court re-affirmed that the defendant bore the burden of proving his claim); *Purkett v. Elem*, 515 U.S. 765, 768 (1995) (it was erroneous for the lower court to require a plausible or persuasive race-neutral explanation during the second step of the *Batson* challenge, because that "violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike").

Accordingly, it stands to reason that the defendant also bears a burden of *producing* evidence of purposeful discrimination at trial. As the Court explained in *Johnson v. California*: "The first two *Batson* steps govern the production of evidence that allows the trial court to determine the persuasiveness of the defendant's constitutional claim." 125 S.Ct. at 2417-2418. If a defendant is not required to produce such evidence at trial, then the reviewing court is left without the benefit of any explanations that might have been offered by the prosecutor, and, additionally, the original finder of fact – the trial court – is, at least in part, removed from the decision-making process. Such a circumstance is directly contrary to *Batson*, which stated that when there is an inference of discrimination, "the trial court must undertake a 'factual inquiry' that 'takes into

account all possible explanatory factors' in the particular case." *Batson*, 476 U.S. at 95; *see Johnson v. California*, 125 S.Ct. at 2417 ("in describing the burden-shifting framework, we assumed in *Batson* that the trial judge would have the benefit of all relevant circumstances, including the prosecutor's explanation, before deciding whether it was more likely than not that the challenge was improperly motivated"); *Miller-El v. Dretke*, 125 S.Ct. 2317, 2331 (2005) ("As for the law, the rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it.").

This is not to say, of course, that a defendant must produce any great quantity of evidence to have his claim evaluated by the trial court. To the contrary, as the Court explained in *Johnson v. California*:

> We did not intend the first step to be so onerous that a defendant would have to persuade the judge – on the basis of all the facts, some of which are impossible for the defendant to know with certainty – that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.

125 S.Ct. 2517. But while a defendant need not produce any particular quantum of evidence, he must nevertheless produce some evidence.

Unlike the now-defunct rule that California followed prior to *Johnson v. California* – which required the defendant to show, in the first step, that the State's strikes were "more likely than not" motivated by race – the rule in Missouri has been that a defendant need not make any showing of purposeful discrimination in the

first step of a *Batson* challenge. *See State v. Parker*, 836 S.W.2d 930, 939 (Mo. 1992). Instead, once the defendant simply identifies the racial group that the State is allegedly discriminating against, the State must provide its race-neutral reasons for the strike. *See id.*

The practical effect of this rule is that the defendant must then marshal evidence and arguments, in response to the prosecutor's explanations, during the third step. *See id.* ("Assuming the prosecutor is able to articulate an acceptable reason for the strike, the defendant will then need to show that the State's proffered reasons for the strikes were merely pretextual and that the strikes were racially motivated."). In other words, under Missouri's procedure, the defendant's burden of production (along with his burden of persuasion) does not arise until the third step of the process.

But regardless of *when* the defendant's burden of production and persuasion arises at trial, the necessity of producing such evidence and arguments at trial remains – both to give the prosecutor a chance to respond (e.g., to explain what factors might have caused the prosecutor to strike one juror over an allegedly similarly situated juror) and to give the trial judge an opportunity to evaluate the defendant's claim and make credibility determinations in light of any relevant information provided to the court. In short, the defendant's burden of production and persuasion at trial cannot be wholly eliminated if Missouri's procedure is to remain consistent with this Court's precedents (and with traditional notions fairness, i.e., the requirement of notice and an opportunity to respond).

Here, at respondent's trial, the respondent offered few if any arguments (and he cited to very few facts) to support his *Batson* challenge. In fact, with regard to the several race-neutral reasons offered for two of the State's five strikes, respondent made no attempt whatsoever to

show that the State's strikes were motivated by race. App. at A23 ("the majority inexplicably fails to acknowledge that [respondent] did not challenge the State's reasons for striking two of the venirepersons").

But the respondent's failing to carry his burden at trial was wholly ignored by the majority of the Missouri Supreme Court. The respondent raised numerous new arguments on appeal and he cited to additional facts (including newly-alleged, similarly-situated venirepersons) never before mentioned, to support his claim that the prosecutors' strikes had been motivated by race. In response, the petitioner argued that the respondent's new arguments should not be considered, but respondent, citing *Johnson v. California*, argued that inasmuch as "California could not heighten the defendant's burden at step one . . . So, too, Missouri cannot heighten the defendant's burden at step three" (Resp. Reply Brief at 22). But the glaring problem with such an argument is that Missouri had already eliminated the respondent's burden of production at step one; thus, to likewise eliminate it at step three would be to eliminate respondent's burden altogether.

It is, of course, true that, at trial, respondent offered limited argument to support his claim that the State had engaged in purposeful discrimination. But the majority of respondent's arguments (and citations to evidence of alleged discrimination) were first raised on appeal, at a time when the prosecutor was not present to provide any additional explanations, and when no finder of fact was present to weigh credibility. And by considering and accepting the respondent's numerous new arguments on appeal, the majority of the Missouri Supreme Court effectively eliminated the respondent's burden of production at trial and simply extended step three of the *Batson* challenge into the appellate process.

The decision has significant adverse consequences, for it allows a defendant to raise a *Batson* objection but

then stand silent when it comes time to produce any evidence of discrimination, knowing that he or she will have ample opportunity after trial to comb through the record for any facts that might support whatever favorable *post-hoc* arguments can be crafted. But such a procedure simply does not comport with *Batson* and its progeny. *See e.g. Miller-El v. Dretke*, 125 S.Ct. at 2327-2332 (2005) (in analyzing whether the prosecutor had engaged in purposeful discrimination, the Court repeatedly referred to the prosecutor's explanations (or lack of explanations) for strikes, but always in the context of a case where the defendant had appropriately carried his burden of production and given the State an opportunity to provide explanations).

"The Batson framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process." *Johnson v. California*, 125 S.Ct. at 2418. The means of obtaining "actual answers" lies within the framework that requires a defendant to make his or her challenge at trial and present the proper questions. Indeed, as the Court has stated: "The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question." *Id.*

In other words, rather than gleaning the record after trial for indicia of discriminatory purpose, a defendant should be expected to make his challenges and marshal his evidence at trial – at a time when the prosecutor can offer relevant explanations, and at a time when the finder of fact can made the determinations that it is in the best position to make. Such an approach "simultaneously serves the public purposes *Batson* is designed to vindicate and encourages 'prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process.' " *Id.* In short,

because the Missouri Supreme Court's decision fundamentally strays from these basic guidelines, it is contrary to *Batson* and the other precedents cited above.

II. The procedure followed by the majority of the Missouri Supreme Court will not enhance the court's ability to curtail discrimination, and inasmuch as it conflicts with *Batson* and other decisions from the Federal Circuit Courts and state courts of last resort it should not be allowed to stand.

The petitioner acknowledges that courts should be unceasing in their efforts to eradicate purposeful discrimination from the courtroom. "When the government's choice of jurors is tainted with racial bias, that 'overt wrong . . . casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial . . . .' " *Miller-El v. Dretke*, 125 S.Ct. at 2323-2324. Petitioner also acknowledges, due to the difficulty in uncovering purposeful discrimination, that trial courts should analyze "all relevant circumstances" in determining whether a given prosecutor has engaged in purposeful discrimination. *Id.* at 2325.

But consistent with *Batson*, which assumed that the finder of fact would have "all relevant circumstances," the State should be given a fair opportunity to respond to a defendant's charges of purposeful discrimination. And that means that a defendant must carry his burden of production and persuasion at trial. This is the more reliable means of facilitating the trial court's search for the truth, for it places potentially relevant information before the trial court and it deters criminal defendants from lodging an objection and then standing silent, in favor of raising *post-hoc* allegations that can neither be responded to by the State nor evaluated by the finder of fact. Indeed, if a defendant is held to the claims that he made at trial, then courts will avoid the less reliable

speculation that might follow on appeal, where the reviewing court has no means of discerning, from the cold record, the participants' demeanor and credibility.

And, in fact, this is the approach that other courts have taken. In *United States v. Boyd*, 168 F.3d 1077, 1077-1078 (8th Cir. 1999), for example, the defendant raised a *Batson* claim, and the U.S. Court of Appeals for the Eighth Circuit denied the claim, concluding that the trial court had not erred in crediting the prosecutor's race-neutral explanations. The Court then stated: "We do not reach Boyd's related contention that the Government allowed a similarly situated white person to remain on the jury *because Boyd raises the argument for the first time on appeal*, and even if we considered the contention, it is unsupported by the record. *Id.* at 1078 (emphasis added). The Court's decision not to consider the defendant's new claim was, for the reasons discussed above, consistent with both *Batson* and traditional notions of fairness. For, when the defendant alleges that the State has engaged in purposeful discrimination, the State should be apprized of the particulars of the claim and given a fair opportunity to respond. *See Atwater v. Crosby*, 451 F.3d 799, 807 (11th Cir. 2006) ("When an allegation of pretext is raised, the defendant bears the burden of convincing the district court that the proffered reasons are pretextual by introducing evidence of comparability. No such effort was made in this case. . . . conspicuously absent from the trial record is some argument or evidence of comparability at the time that the *Batson* challenge was made to refute the prosecutor's reason for the strike" (citation omitted)); *United States v. Forbes*, 816 F.2d 1006, 1011 (5th Cir. 1987) ("Now it is too late for appellants to insist on an explanation they did not request at trial. The 'timely objection' rule is designed to prevent defendants from "sandbagging" the prosecution by waiting until trial has concluded unsatisfactorily before insisting on an explanation for jury strikes that by then the prosecutor

may largely have forgotten" (citations omitted)); *State v. Walston*, 886 P.2d 349, 355-356 (Kan. 1994) ("the comparative analysis advanced on appeal was not presented to the trial court at the time the objection was made. Walston carries the ultimate burden of persuasion on whether the State engaged in intentional discrimination.").

In respondent's case, the majority of the Missouri Supreme Court abandoned this line of reasoning and considered each and every new factual allegation and *post-hoc* argument raised by the respondent. And, citing the Court's recent decision in *Miller-El v. Dretke*, the majority justified its departure from previous precedent by asserting that it was simply engaging in the type of "side-by-side comparisons" this Court engaged in in *Miller-El v. Dretke*. App. at A20 n. 27.[1] But, while side-by-side comparisons are certainly a valid means of examining whether the prosecutor's race-neutral explanations will withstand scrutiny (and of determining whether the trial court clearly erred), the Court in *Miller-El v. Dretke* did not hold that a reviewing court should consider evidence or arguments that were not raised at trial. To the contrary, the Court repeatedly cited to the prosecutor's explanations (or lack thereof) in examining whether the trial court had clearly erred. *Miller-El v. Dretke*, 125 S.Ct. at 2327-2332. Accordingly, even after *Miller-El v. Dretke*, it follows that the prosecutor should be given a fair opportunity to offer any explanations called for by the defendant's evidence and arguments. Or in other words, *Miller-El* should not be read to *require* or even authorize the consideration of facts, evidence, or arguments not raised at trial. *See generally Hightower v. Terry*, --- F.3d ----, 2006 WL 2252512 (11th Cir. 2006) (declining, after *Miller-El v. Dretke*, to review claim that venirepersons of different races were questioned

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[1] The dissenters specifically pointed out the majority's departure from previous Missouri precedent. App. at A20.

differently, because the claim had not been raised in a timely fashion); *People v. Gray*, 118 P.3d 496, 511 (Cal. 2005) ("*Miller-El* thus did not consider whether an appellate court must conduct a comparative juror analysis in the first instance, when the objector has failed to make a prima facie showing of discrimination, or whether an appellate court must conduct a comparative juror analysis for the first time on appeal, when the objector failed to do so at trial.").

In short, the procedure followed by the majority of the Missouri Supreme Court is inconsistent with *Batson*, which assumed that prosecutors would have an opportunity to offer relevant explanations, and it conflicts with precedent from the Courts of Appeals and other state courts of last resort. Accordingly, the Court should grant the petition to clarify whether the type of analysis performed in *Miller-El v. Dretke* can or should be attempted when the prosecutor has not been given notice of the defendant's particular claims and an opportunity to respond.

III. The Missouri Supreme Court's procedure places the reviewing court in the position of having to evaluate facts *de novo*, and of having to resolve factual questions from an inferior standpoint, without the benefit of "all possible explanatory factors."

In addition to eliminating or substantially lessening a criminal defendant's burden of proving purposeful discrimination at trial, the Missouri Supreme Court's procedure departs from this Court's precedent by placing the reviewing court in the position of the finder of fact. Indeed, by extending the defendant's ability to produce evidence and arguments into the appellate process, the reviewing court necessarily finds itself weighing evidence as opposed to simply determining whether the evidence supports the trial court's previous

factual determinations.

In evaluating a *Batson* claim, the trial court must make the factual determination of whether the prosecutor has engaged in purposeful discrimination. *Hernandez v. New York*, 500 U.S. 352, 364-365 (1991) (plurality opinion); *Hernandez v. New York*, 500 U.S. at 372 (O'Connor, J., concurring).

> In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.'

Id. at 365 (plurality opinion); *see also Rice v. Collins*, 126 S.Ct. 969, 977 (2006) ("The trial judge is best placed to consider the factors that underlie credibility: demeanor, context, and atmosphere. And the trial judge is best placed to determine whether, in a borderline case, a prosecutor's hesitation or contradiction reflect (a) deception, or (b) the difficulty of providing a rational reason for an instinctive decision.") (Breyer, J., concurring opinion).

In the case at bar, as the dissenting judges observed, the majority engaged in a *de novo* review of the facts. App. at A24. The majority disputed this characterization of its efforts, but even in disputing the dissenters' assertion, the majority revealed that it was, in fact, usurping the place of the trial court in evaluating the respondent's *Batson* challenges. The majority stated:

> With regard to the dissent, the principal opinion does not inappropriately conduct a *de novo* review as the dissent claims when applying the

> "totality of relevant facts" test, but rather follows *Batson* and *Miller-El* exactly in that [respondent] established a "prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Batson v. Kentucky*, [citation omitted]; *Miller-El v. Dretke*, [citation omitted]. Once [respondent] established his prima facie case, the principal opinion followed the United States Supreme Court's precedent and performed side-by-side comparisons between the black venire panelists who were struck and white panelists allowed to serve.

App. at A20 n. 27. But determining whether the defendant has made a "prima facie case of purposeful discrimination" is, ordinarily, a function of the trial court. Moreover, evaluating factual claims – like those that were raised for the first time on appeal by the respondent – is plainly a function of the trial court.

It was not simply the majority opinion's use of "side-by-side" comparisons that caused the dissenters to conclude that the majority had engaged in a *de novo* review of the facts; rather, it was "the length to which the majority stretches to satisfy the critical reader that the state's explanations were not race-neutral . . . ." App. at A20. Moreover, it was the fact that "the majority fail[ed] to give so much as a passing reference to the rule that reviewing courts should defer to the trial court's judgment when it comes to assessing the legitimacy of an explanation for a peremptory strike." App. at A20. Indeed, while the majority opinion mentioned that "[t]he trial court denied [respondent's] *Batson* claim," App. at A3, the substance of the trial court's factual findings are wholly absent from the opinion. Thus, rather than laying out the factual findings of the court, reviewing the record to determine whether there was evidence to support the trial court's findings, and deferring to the credibility determination of the trial court, the majority

adopted many of the factual averments asserted by the respondent on appeal and concluded, based on its independent, *de novo* review of the facts that the prosecutors had engaged in purposeful discrimination.

As an example, with regard to Venireperson C.W., the majority acknowledged that her telephone had been ringing during voir dire, but it declined to conclude (as the trial court apparently found) that her actions during voir dire supported the prosecutor's stated belief that C.W. was not taking the proceedings seriously. App. at A6. There was no basis for concluding that the trial court clearly erred in crediting this reason; rather, the majority just dismissed this concern as unimportant and pointed out that the State had failed to strike a different venireperson, J.B., who, in the majority's estimation, was not a good juror for the State (despite the trial court's determination that he was a qualified juror). App. at A6. But, as a practical matter, J.B.'s qualifications were unrelated to determining whether the State had discriminated against C.W. There was no similarity between C.W. and J.B. – J.B. just happened to be a non-African-American venireperson who was not struck, and whom the State had previously considered as a candidate to strike for cause.

Moreover, even if J.B.'s qualifications were a relevant consideration under the totality of the circumstances, this was a piece of evidence that respondent did not raise until appeal; thus, the prosecutor had no opportunity to provide an explanation for striking C.W. over J.B. And, consequently, the majority's speculation about J.B. is of little or no value in revealing whether the prosecutor's discriminated. *See generally Johnson v. California*, 125 S.Ct. at 2418 ("The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question."). On the other hand, there are under-

standable reasons for retaining a juror whom the trial court has determined to be qualified, over a juror who appears not to be taking the proceedings seriously and who has a substantial work-related hardship.

With regard to C.W.'s work-related hardship, the majority concluded that Venireperson S.R. was similarly situated with C.W. App. at A7. In fact, the majority went so far as to state that S.R.'s employment-related hardship was "more definite than C.W's claim" of hardship. App. at A7. But in reaching this conclusion, the Court omitted the material fact that S.R. was merely a "cashier" (unlike C.W., who was one of two available area managers for her company), that S.R. admitted that her company could fill her place if she had to be absent from work (unlike C.W., who said that she did not "know if my boss will allow me to be out"), and that the upcoming audit at S.R.'s place of employment was scheduled to occur *after* the conclusion of appellant's trial (Voir Dire Tr. 163-164). These were material facts that explained precisely why the prosecutor struck C.W. instead of S.R. Indeed, when these facts are included, it is readily apparent that S.R. was not similarly situated with C.W., and that the trial court did not clearly err in determining that the two venirepersons were not similarly situated. App. at A24.

The majority also concluded that C.W. would have been a "strong" juror for the State because her father had been shot to death and because she had a working relationship with law enforcement. App. at A5-6. But this conclusion, too, failed to acknowledge material facts, namely: first, that C.W. was not satisfied with the manner in which her father's case had been concluded (Voir Dire Tr. 514); and second, that C.W.'s relationship with law enforcement consisted of hearing complaints and grievances from police officers who had gotten into trouble with the department and wanted to dispute their reprimands (Voir Dire Tr. 603-604). Thus, the totality of

her responses show that she would not have been a particularly "strong" juror for the State.

The majority's analysis related to Venireperson C.W. is merely a representative sample of the great "length to which the majority stretch[ed]," App. at A20, to conclude that the trial court had clearly erred in determining that the State engaged in purposeful discrimination. Indeed, as to each of the State's strikes, the majority engaged in what can only be termed a *de novo* review that simply failed to properly apply the deferential, clearly erroneous standard that applies to factual findings. The majority opinion consistently accepted respondent's new factual averments (e.g., new claims that a particular venireperson was similarly situated with one of those whom the State struck), even though the prosecutor was never given an opportunity to offer any relevant explanation that he might have had. The majority opinion omitted material facts. And, in consistently reciting the evidence in a light not favorable to the trial court's findings, the majority opinion ignored the principle that where there are two permissible views, the factfinder's choice between them cannot be clearly erroneous. *See Hernandez v. New York*, 500 U.S. 352, 369 (1991) (plurality opinion).

IV. A procedure that allows a defendant to stand silent at trial (or to raise new arguments and factual claims on appeal) will transform *Batson* into a guessing game for prosecutors and merely encourage sandbagging.

The difficulties that prosecutors will face in exercising their peremptory challenges under the procedure used by the majority in this case cannot be gainsaid. If a defendant can comb through the record after trial and cite to any and all bits of "evidence" that purport to show a pattern of racial discrimination, a prosecutor will be hard pressed to anticipate such

evidence at trial and offer explanations that account for such evidence.

Here, for example, as discussed above, on appeal respondent pointed to the fact that Venireperson J.B. had not been struck by the State. This was "evidence" of purposeful discrimination because the prosecutor had previously sought to remove J.B. for cause; and, according to respondent and the majority of the Missouri Supreme Court, the State's change toward J.B. evinced an inference of purposeful discrimination against C.W., who, incidentally (according to respondent and the majority), was a "strong" juror for the State. But this chain of inferences was based upon a fact not cited by respondent at trial; and, accordingly, there was no real opportunity for the prosecutor to explain why he struck C.W. over J.B. (if the comparison even crossed the prosecutor's mind), and no opportunity for the trial court to consider that fact (along with any concomitant explanation) in determining whether the State was engaged in purposeful discrimination. In fact, the only way the prosecutor could have produced evidence to refute the post-hoc allegation was to anticipate that J.B.'s presence on the jury would be cited as "evidence" of discrimination, and spontaneously provide an explanation for striking C.W. over J.B. Of course, such spontaneous declarations could appear strained – especially where the anticipated "evidence" is tenuous – and a prosecutor could easily be deemed to have protested too much if he or she responds to arguments that the defendant has not bothered to make.

The same problem exists with new allegations that a particular venireperson was "similarly situated" with one of the venirepersons struck by the State. If such "similarly situated" venirepersons are not named at trial, the prosecutor must try to guess which of the venirepersons the defendant will later identify as similarly situated – even if they are not similarly situated

in the prosecutor's mind due to something that occurred during voir dire. Such a guessing game puts an undue burden on the prosecutor – especially inasmuch as the defendant carries both a burden to produce some evidence of purposeful discrimination and a burden to persuade the trial court that the prosecutor has engaged in purposeful discrimination. In short, if a defendant will be permitted to raise new factual allegations and arguments on appeal, the prosecutor at trial is placed in the untenable position of attempting to argue against claims that have not yet been made.

CONCLUSION

For these reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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September 11, 2006

APPENDIX

TABLE OF CONTENTS

Order of the Missouri Supreme Court
denying petitioner's motion for rehearing A1

Missouri Supreme Court's opinion
filed May 16, 2006 ..... A2-A27

[State Seal]
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June 13, 2006

Mr. Shaun J. Mackelprang
Office of Missouri Attorney General
P.O. Box 899
Jefferson City, MO 65102

In Re: State of Missouri, Respondent, vs. Vincent McFadden, Appellant.
Missouri Supreme Court No. SC86857

Dear Mr. Mackelprang:

Please be advised that the Court issued the following order on this date in the above-entitled cause:

"Respondent's motion for rehearing overruled."

Very truly yours,

THOMAS F. SIMON

s/ Cynthia L. Turley
Cynthia L. Turley
Deputy Clerk, Court en banc

cc:
Ms. Rosemary Percival

191 S.W.3d 648

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI,
Respondent,

v.

VINCENT McFADDEN,
Appellant.

No. SC86857

May 16, 2006
Rehearing Denied June 13, 2006

Ronnie L. White, Judge.

I.

A jury convicted Vincent McFadden (McFadden) of first-degree murder and armed criminal action. McFadden was given the death penalty consistent with the jury's recommendation. This Court has jurisdiction pursuant to MO. CONST. art. V, sec. 3. Among his nine points of error, McFadden raises a valid *Batson* challenge. The judgment is reversed and the case is remanded.

II.

The facts, which this Court reviews in the light most

favorable to the verdict,[1] indicate that on July 3, 2002, McFadden and Michael Douglas encountered Todd Franklin. An altercation ensued, during which Douglas and McFadden each shot Franklin who died at the scene. McFadden was charged with the first-degree murder and armed criminal action.

At trial, the State exercised five of its nine peremptory challenges to remove African-American venirepersons, leaving only one African-American to serve on the jury. The defense counsel challenged the strikes under *Batson v. Kentucky*.[2] After the State offered explanations, defense counsel argued that these reasons were merely pretextural. The trial court denied McFadden's *Batson* claim. The jury found McFadden guilty of both charges. During the penalty phase, the jury found five statutory aggravators and recommended a sentence of death. On April 22, 2005, the court sentenced McFadden to death and to a term of life

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[1] *State v. Taylor*, 134 S.W.3d 21, 24 (Mo. banc 2004).

[2] *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). "It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to person of those classes the full enjoyment of that protection which others enjoy." *Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317, 2323, 162 L.Ed.2d 196 (2005) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 309, 25 L.Ed. 664 (1880)). Racial discrimination in jury selection compromises the defendant's right to a trial by an impartial jury, *Miller-El*, 125 S.Ct. at 2323 (citing *Strauder*, 100 U.S. at 308, 10 Otto 303), and essentially creates "state-sponsored group stereotypes rooted in, and reflective of, historical prejudice." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). This discriminatory practice "invites cynicism respecting the jury's neutrality," *Powers v. Ohio*, 499 U.S. 400, 412, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), undermines public confidence, *Georgia v. McCollum*, 505 U.S. 42, 49, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992), and jeopardizes the integrity of the judicial system. *Miller-El*, 125 S.Ct. at 2324.

imprisonment. This appeal followed.

III.

McFadden's *Batson* challenge is dispositive. It has been long recognized that racial discrimination in jury selection violates the Equal Protection Clause.[3] In *Batson v. Kentucky*, the United States Supreme Court held that a defendant could make out a prima facie case of discriminatory jury selection by "the totality of the relevant facts" of the prosecutor's behavior during the defendant's trial.[4]

In *State v. Parker*, this Court set forth the procedure to be followed when a defendant makes a *Batson* challenge.[5] First, a defendant must challenge one or more specific venirepersons struck by the State and identify the cognizable racial group to which they belong.[6] Second, the State must provide a race-neutral reason that is more than an unsubstantiated denial of discriminatory purpose.[7] Third, the defense must show that the State's explanation was pretextual and the true reason for the strike was racial.[8]

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[3] *Strauder*, 100 U.S. at 308, 10 Otto 303; *Miller-El*, 125 S.Ct. at 2324; *State v. Edwards*, 116 S.W.3d 511, 524 (Mo. banc 2003); *State v. Brown*, 958 S.W.2d 553, 553 (Mo. banc 1997); *State v. Parker*, 836 S.W.2d 930, 933 (Mo. banc 1992).

[4] *Batson*, 476 U.S. at 94, 106 S.Ct. 1712. *See also Miller-El*, 125 S.Ct. at 2324; *Parker*, 836 S.W.2d at 933; *State v. Antwine*, 743 S.W.2d 51, 64 (Mo. banc 1987).

[5] *Parker*, 836 S.W.2d at 939.

[6] *Id.*

[7] *Id.*

[8] *Id.*

To show pretext, the defense can present "side-by-side comparisons" of venirepersons allegedly struck for racially discriminatory reasons with those who were allowed to serve.[9] Evidence of purposeful discrimination is established when the stated reason for striking an African-American venireperson applies to an otherwise-similar member of another race who is permitted to serve.[10] In evaluating a *Batson* challenge, the trial court's "chief consideration should be the plausibility of the prosecutor's explanations in light of the totality of the facts and circumstances surrounding the case."[11]

The trial court's findings with regard to a *Batson* challenge will be set aside if they are clearly erroneous.[12] A finding is clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake has been made.[13] In light of the totality of the following facts and circumstances, this Court is left with the definite and firm conviction that the trial court was mistaken in this case:

Venireperson C.W.

It appears that African-American venireperson C.W. would have been a strong juror for the State. Her father had been shot to death and she had a working

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[9] *Miller-El*, 125 S.Ct. at 2325. *See also Edwards*, 116 S.W.3d at 525; *Antwine*, 743 S.W.2d at 65.

[10] *Miller-El*, 125 S.Ct. at 2325; *Edwards*, 116 S.W.3d at 525; *Antwine*, 743 S.W.2d at 65.

[11] *Parker*, 836 S.W.2d at 939. *See also Miller-El*, 125 S.Ct. at 2331; *Edwards*, 116 S.W.3d at 527; *Antwine*, 743 S.W.2d at 64.

[12] *Edwards*, 116 S.W.3d at 525; *Antwine*, 743 S.W.2d at 66.

[13] *Edwards*, 116 S.W.3d at 525; *Antwine*, 743 S.W.2d at 66.

relationship with law enforcement. Despite these facts, the State claims it struck C.W. for two reasons: (1) her telephone rang and (2) it would have been difficult for her to be absent from work.

First, the State contends it struck C.W. because her telephone rang. The prosecutor claimed that C.W. did not take the process seriously because she was fiddling with her telephone and distracting other members of the panel. Defense counsel countered that it appeared C.W. was fumbling because she was having difficulty turning her telephone off, but eventually succeeded.

It does not appear that there was a white juror who had trouble with her telephone, but such an identical comparison is not necessary. "A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters."[14]

Even though the State made no record of C.W.'s telephone ringing at the time and failed to ask the court to instruct venirepersons to turn off their telephones, the State was apparently so bothered that it used the strike on C.W. and allowed white venireperson J.B. to remain on the jury. During voir dire, J.B. repeatedly stated that he would want the State to prove guilt beyond any possible doubt before he could impose a death sentence. The State unsuccessfully moved to strike J.B. for cause, arguing that it "was quite clear he would require a higher burden for guilt before he would consider the death penalty." Yet, rather than striking a white venireperson who required a higher burden of proof, the State struck an African-American because her telephone rang.

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[14] *Miller-El*, 125 S.Ct. at 2329, n. 6.

Second, the State asserts that it struck C.W. because it would have been difficult for her to be absent from work. During voir dire, C.W. stated:

> I'm a manager for a cleaning company and in our group there is three area managers. One is out of town – I mean one is sick, brain concussion and the other one has his own area, and I don't know if my boss will allow me to be out because I have to handle all buildings in the evening. Make sure all the cleaners are at work on time and any problems that come up.

The State failed to strike white juror S.R. who also expressed that she would have difficulty taking time away from work. S.R. worked for a company that was about to undergo an audit. She was "one of the key people" and her employer had written a letter for her to give to the court explaining the extent of the hardship. She worked in the "back office" and needed "to account for all the transition. The cash coming in and out and stuff." A lot of work was needed to prepare for the audit.

Not only was S.R.'s statement of hardship more definite than C.W.'s claim, but S.R. had an additional reason to be struck. S.R. expressed a familiarity with the scene of the murder. The State indicated that there had been extensive construction in the area since the time of the murder and had concerns that jurors familiar with the scene would not rely exclusively on witness' accounts of the scene as it existed at the time of the murder. This familiarity with the area of the crime served as the rationale for striking African-American venirepersons C.N., M.B., V.G., and W.S. Yet, in addition to S.R., there were four additional white jurors with familiarity with the area of the crime who were not

struck.[15]

Venireperson C.N.

The State contends African-American venireperson C.N. was struck for four reasons: (1) she was an employee of the St. Louis City School District and would likely be liberal, (2) she lived in a high crime area but never heard gunshots, (3) jury service would create a hardship, and (4) she was familiar with the area of the crime. Each of these reasons either equally applied to white jurors who were not struck by the State or had no relevance to the case.

First, the prosecutor claimed he struck C.N. because she was an employee of the St. Louis School District. However, in *State v. Edwards*, this Court rejected the notion that a juror's employment as a postal worker was sufficient reason to justify a peremptory strike.[16] This Court held that, "[i]f the mere incantation of the phrase 'he is a postal worker' were sufficient to overcome any showing of pretext, the third step of the *Batson* test would be illusory."[17] In that case, the following guidance was offered:

In the future, trial courts should similarly consider

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[15] The following five white jurors said they were familiar with the area of the crime and were not struck by the State: S.R. (whose aunt and uncle had lived in the area); J.S. (whose father and grandparents had lived in the area), L.S. (who had worked in the area), R.K. (who had done electric utility work in the area), and E.D. (had lived in a nearby community for 30 years and often had shopped in the area).

[16] *Edwards*, 116 S.W.3d at 525-28.

[17] *Id.* at 526. *See also Edwards*, 116 S.W.3d at 550 (Teitelman, J., concurring) ("in the vast majority of cases, a prospective juror's employment has nothing to do with his or her ability to fairly weigh the evidence and arrive at a just decision").

> strikes based on occupation carefully, assessing them for pretext by looking at whether the occupation and the claimed traits relate to the particular case or juror, whether similarly situated jurors are treated differently, and so forth, considering the factors set out above, and not allow a strike to rest solely on the claim that the juror is "a postal worker."[18]

The Court held that the trial court had not clearly erred in allowing the strike, because the prosecutor described his prior negative experiences with postal workers as jurors, gave specific reasons why they would not be good jurors, and struck two other jurors who had similar occupations to the challenged postal worker.[19]

Here, the prosecutor failed to explain the basis for his opinion, or describe what his prior experiences entailed, or give specific reasons for why an employee of the St. Louis school system would be unfavorable for the State. Without more, C.N.'s employment with the school district is pretextual.

Second, the prosecutor argued that he struck C.N. because she lived in a high crime area and had never heard gunshots. This appears to be loosely related to the case because witnesses living in high crime areas would be testifying that they heard a gunshot. However, C.N.'s recognition of a gunshot is irrelevant. Not only was the witnesses' recognition of a gunshot was not in dispute, but even if it were in dispute, it is unclear why a juror's lack of experience in hearing a gunshot is relevant. Additionally, had this issue been relevant, the State would have asked all venirepersons if they could recognize the sound of a gunshot. "[T]he State's failure

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[18] *Edwards*, 116 S.W.3d at 528.

[19] *Id.*

to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination."[20]

Finally, the prosecutor asserts he struck C.N. because of hardship and her familiarity with the area of the crime. C.N. suggested it would be difficult for her to serve because it would be hard for her employer to replace her for a week and she was a full-time evening student approaching the end of the term. The State also claimed to have struck C.N. because of her familiarity with the area of the crime. However, as noted above, white juror S.R. also expressed hardship and, along with four other white jurors who were not struck, had a familiarity with the area of the crime.

Venireperson M.B.

Like C.W., it appears that African-American venireperson M.B. would have been a strong juror for the State. She expressed confidence in the ability of fingerprint evidence to show guilt. Since the defendant had given notice of an alibi defense, M.B.'s belief in the accuracy of fingerprint evidence would have served the State well. Also, like C.W., M.B. had a family member who had been shot to death.

However, despite these facts, the State struck M.B. citing the following four reasons: (1) she had problems with the concept of acting in concert, (2) she was familiar with the area of the crime, (3) she knew a relative of a potential witness, and (4) she had an unrealistic view of scientific evidence.

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[20] *Miller-El*, 125 S.Ct. at 2328 (quoting *Ex parte Travis*, 776 So.2d 874, 881 (Ala.2000)).

First, the State argues that it struck M.B. because she had problems with the concept of acting in concert. However, there is no support for this position. Although other venirepersons had expressed difficulty with the concept, M.B. never did.

Second, the State claims that M.B. was familiar with the area of the crime. However, as noted above, five white venirepersons also possessed familiarity with the area of the crime and were not struck from the jury.

Third, the State asserts that it struck M.B. because she knew a relative of a potential witness. M.B. indicated that her niece had dated someone with the same last name as one of the witnesses, but that she did not know any family members of the man her niece had dated. The prosecutor stated that he removed M.B. because she knew the witness's family and her "close involvement" with the family could be a problem. However, M.B. did not know the witness and was not even asked how well she knew the man her niece had dated. Additionally, because this loose connection was to a witness for the State, any bias would arguably be in favor of the State.

Finally, the State contends that it struck M.B. because she had an unrealistic view of scientific evidence. M.B. had indicated that she was a medical laboratory technologist who worked full time for the crime laboratory in St. Louis County. She indicated that she did not personally do any testing and she did not have contact with people who did. She stated, "If you are going to [commit a crime], you are going to get caught with the technology that they have today." While M.B.'s confidence in forensic evidence may be high, such a belief would only strength-en the credibility of the State's fingerprint evidence linking McFadden to the crime.

In addition, the State failed to strike white juror L.S.

who also had exposure to police laboratory work. L.S.'s boss worked with the Missouri State Highway Patrol to create standards for laboratory testing and prepare training aids for drug sniffing dogs. L.S. would meet with police officers for the dogs to test the products. He had discussed with police officers "interesting kind of gruesome stories in the federal lab but not police work in general." Because of M.B.'s certainty that fingerprint evidence would determine guilt, she was a stronger juror for the State than L.S.

Venireperson V.G.

The State gave six reasons for striking African-American venireperson V.G.: (1) she was elderly, opinionated, and hard-headed, (2) she denied that she lived in a high-crime area, (3) she had an ulcer on her leg, (4) she may have read about the case, (5) she was familiar with the area of the crime, and (6) her sister lived in the area of the crime and was the victim of arson. Each of these reasons either equally applied to white jurors who were not struck by the State.

First, the State alleged it struck V.G. because "[s]he's elderly, very opinionated, corrected both myself and defense counsel about questions . . . . She seems very hard-headed and opinionated and may not be good in discussing and considering views of other jurors." However, as Judge Teitelman recognized, strikes based on vague references to attributes like demeanor "are largely irrelevant to one's ability to serve as a juror and expose venirepersons to peremptory strikes for no real reason except for their race."[21] Accordingly, such vague references are heavily scrutinized.

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[21] *Edwards*, 116 S.W.3d at 550 (Teitelman, J., concurring).

Second, the State offered that V.G. "lives in a high crime area but denied that it is high crime." V.G. stated that she lived in an area that the City of St. Louis considered a high crime area. She did not consider it a high crime area even though she was robbed there once. However, this Court must consider whether the explanation provided by the State was related to the case to be tried, clear and reasonably specific, and legitimate.[22] Here, it is unclear that V.G.'s assessment of her own neighborhood has any bearing whatsoever on the case at hand.

Third, the prosecutor allegedly struck V.G. because she had a problem with her leg, and he did not want to run out of jurors because of an infirmity. While V.G. had an ulcer on her leg and she had planned to see the doctor the following week, she also indicated that it was doing better and healing. In addition, the State failed to strike white juror C.S. for his infirmity. C.S. was questioned at length regarding his problem with anxiety attacks. C.S. informed the court that he has taken medication to fight anxiety attacks for fifteen years, and he did not know how he would handle sequestration. If he felt a panic attack coming on, he could take extra medication, but it would not help right away and he would be unable to listen to the evidence. If the State was truly afraid of losing a jury due to infirmity, C.S. appears to have been a stronger candidate for the use of the State's peremptory strike.

Fourth, the State expressed concern that V.G. had read about the case, yet failed to strike a similarly situated white juror. V.G. indicated that she might have read about the case in the newspaper, because she reads the paper daily. However, V.G. indicated that if

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[22] *Miller-El*, 125 S.Ct. at 2324; *Edwards*, 116 S.W.3d at 527; *Parker*, 836 S.W.2d at 934; *Antwine*, 743 S.W.2d at 64.

she had read about the case, she did not remember any of the details. She indicated that if she recalled something during the course of the trial, she knew she could set it aside, and nothing she read would keep her from being fair and impartial. Although white juror R.K. could not recall details, he was more certain that he had read about the case in the newspaper.

Fifth, the State removed V.G. due to her familiarity with the area of the crime. As previously examined, this reason equally applied to five white jurors who were not struck by the State.

Finally, the State commented that V.G.'s sister resided in the area of the crime and was an arson victim. However, the State alleged in this case that McFadden had terrorized the area and if the jurors cared about the people in the area, they would find McFadden guilty. Logically, a juror with a personal connection to a crime victim in the area would only strengthen the credibility of the State's argument.

Venireperson W.S.

The State stated the following four reasons for striking African-American venireperson W.S.: (1) he seemed to be agitated and confused about his role as a juror, (2) although he lived very close to the area of the crime, he stated he was not familiar with it, (3) he did not want to share details about his nephews' work in law enforce-ment with the rest of the panel, and (4) he appeared to be sleeping during voir dire.

First, the State argues that it struck W.S. because he seemed to be agitated and confused about his role as a juror. The State's allegation appears to be based on the following exchange:

VENIREPERSON W.S.: You got aggravation and what

do they get, the crime attorney, the defense attorneys, they got an eye witness. How do that work? It's up the jury or who are you going to believe?

MR. BISHOP: Right.

VENIREPERSON W.S.: You said only one eye witness.

MR. BISHOP: I'm sorry.

VENIREPERSON W.S.: What if there is more than one eye witness? You got one, she got one. How do that work?

MR. BISHOP: I guess I'll ask you. If you are selected as a juror, you have to determine the credibility of the witnesses. That's your job. Can you make that decision? If there are witnesses with competing stories, can you make the decision of who is telling the truth and who is lying?

VENIREPERSON W.S.: Yes.

While W.S. may have been initially confused about his role as a juror, this confusion seems to have been alleviated by counsel's explanations. There is no indication that W.S.'s confusion would have impaired his ability to serve as a juror.

Second, the State asserts that it struck W.S. because, although he lived very close to the area of the crime, he stated he was not familiar with it. Although, W.S.'s zip code indicates he lived in Jennings, which is near the area of the crime, the State faults him for not responding that he was familiar with the area. Even if it were established that W.S. was familiar with the area of the crime, the State did not strike five white jurors who

responded affirmatively that they were familiar with the area. For example, E.D. stated that she lived in Jennings for over thirty years and frequently shopped in the area of the crime. The State removed W.S. on the mere possibility that he was familiar with the area, yet left E.D. and four other white jurors who definitely were familiar with it.

Third, the State asserts that it struck W.S. because he did not want to share details about his nephews' work in law enforcement with the rest of the panel. When defense counsel asked the panel if anyone had relatives in law enforcement, W.S. responded that he had three nephews in law enforcement. He then asked to approach the bench where the following exchange occurred:

> THE COURT: [W.S.], you had indicated that you had three nephews?
>
> VENIREPERSON W.S.: Three nephews. One is a police officer. One is in Denver, Colorado, and one Washington, D.C., F.B.I. Agent. We don't discuss their affairs. I don't want to get into that.
>
> THE COURT: Is there anything about your nephews being involved in law enforcement that would affect your ability to be a fair juror in this case?
>
> VENIREPERSON W.S.: No, I'm fair and open minded. I am just concerned about their safety.
>
> MS. TURLINGTON: You don't want to disclose their location?
>
> VENIREPERSON W.S.: Yes.
>
> THE COURT: It won't affect your ability to listen to police testimony. You can listen to that fairly and

impartially?

VENIREPERSON W.S.: Yes, I can.

While W.S. had high concern for his nephews' safety, his attitude toward law enforcement appears to be generally positive. Such an attitude is usually favorable to the State's position.

Fourth, the State contends that it struck W.S. because he appeared to be sleeping during voir dire, which is usually a valid reason to exercise a peremptory strike.[23] However, the existence of a valid justification will not preclude this Court from recognizing a *Batson* violation when examining the facts of the case in a larger context.[24]

IV.

The State used its peremptory strikes to remove five of the six qualified African-American venirepersons. In response to the defense's properly-raised *Batson* challenge, the State offered explanations for its strikes – some of which, when examined in isolation, appear to have some validity. However, in light of the totality of the facts and circumstances, it becomes obvious that these explanations were merely pretext for the State's exercise of its peremptory strikes for racially discriminatory reasons. "To excuse such obvious prejudice because the challenged party can also articulate nondiscriminatory reasons for the peremptory strike would erode what little protection *Batson* provides against discrimination in

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[23] *State v. Hall*, 955 S.W.2d 198, 205-06 (Mo. banc 1997).

[24] *Miller-El*, 545 U.S. 231, 125 S.Ct. at 2325; *Antwine*, 743 S.W.2d at 65; *State v. Hopkins*, 140 S.W.3d 143, 157 (Mo.App.2004).

jury selection."[25]

"However guilty a defendant may be, the law requires that a conviction only be obtained through a fair trial. The right to sit before a jury of one's peers, chosen not because of race, but because of their standing as citizens doing their civic duty, is essential to a fair trial."[26] The trial court's denial of the McFadden's *Batson* challenge was clearly erroneous. Accordingly, the judgment can not be allowed to stand.[27]

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[25] *McCormick v. State*, 803 N.E.2d 1108, 1113 (Ind. 2004). *See also Antwine*, 743 S.W.2d at 65.

[26] *Edwards*, 116 S.W.3d at 551 (Teitelman, J., concurring).

[27] *Miller-El*, 545 U.S. 231, 125 S.Ct. at 2340. With regard to the dissent, the principal opinion does not inappropriately conduct a *de novo* review as the dissent claims when applying the "totality of relevant facts" test, but rather follows *Batson* and *Miller-El* exactly in that McFadden established a "prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Batson v. Kentucky*, 476 U.S. 79, 93-94, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317, 2324, 162 L.Ed.2d 196 (2005). Once McFadden established his prima facie case, the principal opinion followed the United States Supreme Court's precedent and performed side-by-side comparisons between the black venire panelists who were struck and white panelists allowed to serve. *Miller-El v. Dretke*, 125 S.Ct. at 2325-2340.

Nor has the Court deviated from its established precedent that when "evaluating a *Batson* challenge," the trial court's chief consideration should be the plausibility of the prosecutor's explanations in light of the totality of the facts and circumstances surrounding the case. *Parker*, 836 S.W.2d at 939. As the United States Supreme Court noted in *Miller-El*, happenstance was unlikely to explain the disparity of the prosecutor's use of its peremptory strikes to exclude 91% of the eligible African-American venire members. *Miller-El v. Dretke*, 125 S.Ct. at 2324. Happenstance also fails the prosecutor in this instance, where 83% of the eligible African-American venire members were stricken using pretextual reasons.

V.

Because McFadden's *Batson* claim is dispositive, it is not necessary to address the remaining eight grounds for appeal. The judgment is reversed and the case is remanded for a new trial.

Moreover, Justice Breyer's reluctant concurrence in *Rice v. Collins*, ---U.S. ----, ---- - ----, 126 S.Ct. 969, 976-977, 163 L.Ed.2d 824 (2006) does not set precedent, nor does it, as the dissent alleges, in any way alter the "totality of the relevant facts" test explained in *Batson* that was applied in *Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005), or the clearly erroneous standard used to review a trial court's ruling in a *Batson* challenge (See *Edwards*, 116 S.W.3d at 525). *Edwards*, 116 S.W.3d at 525. Instead, Justice Breyer opines about the failure of *Batson* to adequately "ferret out unconstitutional discrimination in the selection of jurors," *Id.* at 976, and the passage that follows the paragraph quoted by the dissent addresses the need to ensure those Constitutional protections:

> The upshot is an unresolvable tension between, on the one hand, what Blackstone called an inherently " 'arbitrary and capricious' " peremptory challenge system, *Miller-El*, 545 U.S. 231, *supra*, at ----, 125 S.Ct. 2317, 2343, 162 L.Ed.2d 196 (Breyer, J., concurring) (quoting 4 W. Blackstone, Commentaries on the Laws of England 346 (1769)), and, on the other hand, the Constitution's nondiscrimination command. Given this constitutional tension, we may have to choose. *Miller-El*, 545 U.S. 231, *supra*, at ----, 125 S.Ct. 2317, 2343, 162 L.Ed.2d 196 (Breyer, J., concurring); *Swain v. Alabama*, 380 U.S. 202, 244, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965) (Goldberg, J., dissenting) ("Were it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former"); *Batson*, *supra*, at 107, 106 S.Ct. 1712, 90 L.Ed.2d 69 (Marshall, J., concurring) (same).

Faced with this tension, this principal opinion will not waiver in its responsibility to ensure that a jury is chosen in conformity with the Constitution's requirements, and in this case in particular, it will not accept the prosecutor's attempt to mask racially discriminatory peremptory challenges with absurd rationales.

Wolff, C.J., Laura Denvir Stith and Teitelman, JJ., concur.

Limbaugh, J., dissents in separate opinion filed; Price and Russell, JJ., concur in opinion of Limbaugh, J.

DISSENTING OPINION

Stephen N. Limbaugh, Jr., Judge, dissenting.

I respectfully dissent.

I agree with the majority that the decision to strike a venireperson because of that person's race is unacceptable. However, the majority's decision-making process in this case fails because of its selective identification of the applicable law, its misapplication of the law to the facts and, in several instances, its mischaracterization of the facts themselves. All in all, the majority has failed to show that it was clear error for the trial court to accept the state's race-neutral explanations for its strikes.

I.

Though the majority parrots the appropriate legal standard of review, which is review for clear error, *State v. Edwards*, 116 S.W.3d 511, 525 (Mo. banc 2003), the length to which the majority stretches to satisfy the critical reader that the state's explanations were not race-neutral shows that the majority is actually engaging in *de novo* review so as to reach its preferred outcome. Moreover, the majority fails to give so much as a passing reference to the rule that reviewing courts should defer to the trial court's judgment when it comes to assessing the legitimacy of an explanation for a peremptory strike. *State v. Morrow*, 968 S.W.2d 100, 114 (Mo. banc 1998). The nature of peremptory strikes is

necessarily subjective, and where the evidence before a court is amenable to two competing views, the fact-finder's choice between them cannot be clearly erroneous. *Id.* Thus, even if this Court would have decided a close case differently, if the trial court's decision was plausible, that decision must stand. *Easley v. Cromartie*, 532 U.S. 234, 242, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001).

In much the same way, the majority misapplies the "totality of the relevant facts" test explained in *Batson* and recently applied in *Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005). In *Miller-El* the Supreme Court applied the test in the context of addressing institutional and procedural defects that established the existence of an overarching discriminatory purpose. Specifically, the Supreme Court found evidence of jury shuffling, disparate questioning that amounted to trickery, and a formal written manual on the topic of how to exclude minorities from jury service. *Miller-El*, 545 U.S. 231, 125 S.Ct. at 2333-39. The Supreme Court was not (as the majority appears to do here) using the totality of the relevant facts to apply a *de novo* standard of review to the trial court's determinations as to individual venire-persons. If there were any doubt, just three months ago, in a follow-up case to *Miller-El*, Justice Breyer clarified the "present legal framework" as follows:

> The trial judge is best placed to consider the factors that underlie credibility: demeanor, context, and atmosphere. And the trial judge is best placed to determine whether, in a borderline case, a prosecutor's hesitation or contradiction reflect (a) deception, or (b) the difficulty of providing a rational reason for an instinctive decision. Appellate judges cannot on the basis of a cold record easily second-guess a trial judge's decision about likely motivation. These circumstances mean that appellate courts will, and

must, grant the trial courts considerable leeway in applying *Batson*.

Rice v. Collins, --- U.S. ----, 126 S.Ct. 969, 977, 163 L.Ed.2d 824 (2006) (Breyer, J., concurring).

In *Rice*, the Supreme Court also reconfirmed the rules that prosecutors must abide by when making their peremptory strikes and in defending them after a *Batson* challenge. "Although the prosecutor must present a comprehensible reason [for making the strike] . . . this process does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices." *Id.* at 973-74. And even if the prosecutor's perception of the venireperson is based merely on a race-neutral hunch, or on race-neutral "horse sense," the strike may be made. *State v. Morrow*, 968 S.W.2d 100, 114 (Mo. banc 1998). Unfortunately, these principles too, are omitted from the majority's analysis.

Yet another failing is the majority's methodology in comparing each stricken venireperson to non-stricken venirepersons to determine whether non-stricken venirepersons were similarly situated to those stricken. It is quite evident that, in each case, the majority cherry picked individual characteristics from a number of non-stricken venirepersons (who were otherwise completely different) and then concluded that the sum of those characteristics is the equivalent of a single similarly situated venireperson. This amalgamation of venirepersons to create a sort of super-venireperson that can then be used for comparison is completely incongruous with the analysis it purports to employ. While several of the non-stricken venirepersons shared individual characteristics with the stricken venirepersons – as any human being would! – the majority's methodology does not show that stricken and non-stricken venirepersons were "similarly situated" in a way that gives that term

real meaning.

Finally, the majority inexplicably fails to acknowledge that McFadden did not challenge the state's reasons for striking two of the venirepersons, C.N. and V.G. As this Court has made clear, "the right of criminal defendants to challenge racially motivated strikes by the prosecutor" is "predicated . . . upon the defendant's timely objection." *State v. Parker*, 836 S.W.2d 930, 934 (Mo. banc 1992) (citing *Batson v. Kentucky*, 476 U.S. 79, 96-99, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)). "A defendant's failure to challenge the State's race-neutral explanation in any way waives any future complaint that the State's reasons were racially motivated, and leaves nothing for this Court to review." *State v. Taylor*, 944 S.W.2d 925, 934 (Mo. banc 1997). Thus, the majority's holdings relating to venirepersons C.N. and V.G. are in direct contravention of this Court's precedent.

As for the remaining three venirepersons, a close review of the record shows that none were improperly stricken:

1. Venireperson C.W.

The state offered several race-neutral reasons for striking C.W.: (1) She was visibly distracted during voir dire and was distracting other venirepersons by not taking the voir dire process seriously; (2) her cell phone was ringing throughout the process; and (3) she maintained that it would be an unreasonable hardship to her employer to be without her service for the duration of the trial. On that last point, she had explained that she did not want to be on the jury because she needed her to fulfill her duties as an area manager. These are, of course, race neutral reasons for striking C.W.

According to the majority, however, venireperson S.R. was similarly situated but not stricken. The record does

not bear out that conclusion. S.R. maintained that she did not want to be absent from work when her employer was going through an audit, but the trial court determined that the audit was not to take place until well after the trial was over. C.W. may well have been rightfully concerned about her employer, but S.R. should have had no concern about hers. Furthermore, unlike the situation with C.W., there was no complaint that S.R. was distracted and that her cell-phone was ringing during the proceedings.

2. Venireperson M.B.

The state's race-neutral reasons for striking M.B. were that: (1) she had some connection with a witness in the case; (2) she had several questions about accomplice liability that the prosecutor had not been able to resolve; (3) she was familiar with the Pine Lawn area where the murder occurred; and (4) her expectations of scientific evidence were too high. On appeal, the state now concedes that the prosecutor misspoke in offering the second reason concerning accomplice liability and that he had confused M.B. with another venireperson.

Regarding the state's first reason, M.B. had indicated that she knew a relative of a potential state's witness. The majority found fault with this first reason by arguing that any bias on the part of M.B. due to her connection with the witness would favor the state. This argument is self-defeating. If M.B. could be biased in favor of any party, it follows that this bias could serve as a race-neutral non-pretextual reason for the state to strike M.B.

The majority dismisses the third explanation by claiming that there were "five white venirepersons who also possessed familiarity with the area of the crime [but who] were not struck from the jury." However, these persons were not similarly situated because, unlike

M.B., none of them had "present knowledge" of the Pine Lawn area.

Finally, the majority claims that the state's fourth reason is pretextual because M.B.'s high expectations concerning scientific evidence "would only strengthen the credibility of the State's fingerprint evidence linking McFadden to the crime." This misses the point altogether. As the prosecutor explained, there was little scientific evidence linking appellant to the crime, and he was fearful that M.B. would "expect more" – that she would have unrealistic expectations about the evidence she believed the state ought to be able to produce. This is no proof of pretext.

3. Venireperson W.S.

The state's race-neutral reasons for striking W.S. were that: (1) he appeared agitated, confused and unwilling to be present; (2) he slept during portions of voir dire; (3) he appeared confused over how to handle conflicting wit-nesses; (4) he lived near Pine Lawn, but failed to express his familiarity with Pine Lawn; and (5) he refused to talk about his nephews, who were law enforcement officers. The state's second reason – that W.S. was asleep – is alone sufficient to justify the strike. In fact, the majority acknowledges as much, but then concludes that W.S.'s sleeping must be discounted "when examining the facts of the case in a larger context." No case is found, however, that holds, even in the "larger context," that a sleeping juror is not always subject to a peremptory strike, and in fact, the sleeping juror is most often the proper subject of a strike for cause.

Even without the sleeping juror problem, each of the state's other reasons for the strike were independently sufficient to justify the strike. The majority first addresses the state's concern over W.S.'s agitation and

confusion by simply stating that "there is no indication that W.S.'s confusion would have impaired his ability as a juror." But given the trial court's superior vantage point on matters relating to the venireperson's demeanor, this Court must defer to the trial court's determination. And even if W.S.'s demeanor was not agitated, the fact that he appeared confused concerning the role of the jury is certainly a valid race-neutral reason for striking him.

Then, as with M.B., the majority suggests that familiarity with the Pine Lawn area was a pretextual reason for striking W.S. However, just as with M.B., the majority again fails to explain exactly how W.S. was similarly situated with the venirepersons who were familiar with Pine Lawn and who were not stricken.

Finally, regarding the state's fifth reason – W.S.'s refusal to discuss his nephews' law enforcement experience – the majority concludes that, if anything, "his attitude toward law enforcement appears to be generally positive" and that "such an attitude is usually favorable to the state's position." This conclusion, of course, is speculation, and it may well be that W.S.'s refusal to discuss the matter may be caused by some dissatisfaction with his nephews' experience. In any event, the state's concern that a venireperson may be biased in one way or another toward law enforcement is a valid race-neutral reason for striking a venireperson.

II.

Although I am concerned that five out of six black venirepersons were stricken, and though I agree that such a disproportionate removal of minority venirepersons can be an inference of discriminatory intent, that inference alone will not convert facially neutral explanations into *Batson* violations. *Parker*, 836 S.W.2d at 934. For the reasons stated, the state's

explanations for its peremptory strikes were not "inherently discriminatory." I would hold that the trial court did not clearly err in denying the *Batson* challenges, and I would affirm the judgment.